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## THIRD PUBLIC COMMENT PERIOD JULY 27, 2018 – AUGUST 13, 2018

### RESPONSE TO COMMENTS

#### OVERVIEW AND ORGANIZATION

This document summarizes and responds to public comments submitted to the Department of Toxic Substances Control (DTSC) on the Proposed Rulemaking entitled *Hazardous Waste Facility Permitting Criteria*, which was released to the public on July 27, 2018.

- The proposal was released to the public on September 22, 2017 for comment for forty-five (45) days that ended on November 6, 2017.
- A public hearing was held on November 6, 2017.
- A revised proposal was released to the public on June 29, 2018. The public comment period ended on July 16, 2018. DTSC then extended the public comment period for an additional seven days. Thus, the public comment period for the June 29, 2018 version of the regulations ended on July 23, 2018.
- DTSC then released another version of the proposed regulations for a public comment period that ran from July 27, 2018 to August 13, 2018.

This response to comments document addresses the comments received during the public comment period that ended on August 13, 2018. A total of six letters commenting on the proposal released on July 27, 2018 are provided in Table 1 - List of Commenters. The comment letters are listed by their affiliations in alphabetical order, and the number assigned to their correspondence.

For a list of commenters and response to comments received on the proposed regulations, please refer to the following:

- 45-Day Public Comment Period September 22, 2017 – November 6, 2017 Response to Comments (September 2017 Response to Comments) document; and
- Second Public Comment Period June 29, 2018 – July 23, 2018 Response to Comments (June 2018 Response to Comments) document.

Each comment letter was issued a number starting with “3” (indicating the third set of public comments). DTSC subsequently numbered each of the comments contained in the letters and collated similar comments together. The designation “3-1-1” means the July 27, 2018 through August 13, 2018 comment period comment, letter number 1, comment number 1 and so forth.

All referenced section numbers are found in Division 4.5 of Title 22 of the California Code of Regulations, unless otherwise specified.

Table 1. List of Commenters		
#	Name of Entity	Number of comments
1	California Council for Environmental & Economic Balance	1
2	California Manufacturers & Technology Association	1
3	Morgan Lewis - RCRA Corrective Action Project	1
4	Surplus Lines Association	1
5	Waste Management	1
6	Western States Petroleum Association	1

## FINANCIAL ASSURANCE

### Section 66264.101(b)

#### CORRECTIVE ACTION FINANCIAL ASSURANCE

##### Comments Summary:

DTSC should remove the language that requires a facility to "...establish the financial assurance mechanism to allow the Department access to the funds to undertake corrective measures implementation tasks if the owner or operator is unable or unwilling to undertake the required tasks..." (§ 66264.101(b).) Subpoints to this comment include the following:

- DTSC's proposed changes effectively eliminate the ability to rely on the financial test and corporate guarantee.
- The requirement is vague in that it does not provide any indication what "process" would be acceptable to DTSC.
- United States Environmental Protection Agency (U. S. EPA) previously rejected lesser options such as escrow agreements, certificates of deposit, security interests, and pledges of collateral (46 FR 2802, 2827 and 51 FR 37854, 37855-56.)
- There is questionable authority to directly access and spend funds for corrective action given U.S. EPA's acknowledgement on the limits of its authority to receive funds (46 FR 2802.)
- Existing regulations provide for the establishment of a trust fund in the event of failure to perform closure and/or post-closure (§ 66264.151(h)(1).)

**Comments:** 3-1-1, 3-2-1, 3-3-1, and 3-6-1

**Response:**

DTSC respectfully disagrees with these comments. The modifications made from the proposed regulations dated June 29, 2018 to the version dated July 27, 2018 of the proposed regulations would still allow owners and operators to use the financial test and corporate guarantee to meet financial assurance obligations.

The fact that the term “process” is used does not render the proposed regulations vague. Rather, DTSC intentionally drafted the regulations to allow the owner or operator to use an approach that is mutually acceptable to DTSC and the owner or operator. DTSC expects that many owners or operators would use the standby trust mechanism, a time-honored and proven mechanism. But to the extent there are other processes yet to be proposed by a regulated entity, DTSC did not want to stifle innovation and creativity to achieve a desirable outcome. If the regulated entity proposes an appropriate and enforceable means to ensure performance of corrective measures, DTSC would be able to consider the proposal and whether it would ensure protection of public health and the environment and that it would not burden taxpayers with costs for cleanup of contaminated facilities.

DTSC agrees that, three decades ago, U.S. EPA rejected the types of financial assurance mentioned in the comment. That does not preclude DTSC from considering and allowing different financial assurance mechanisms or related processes.

DTSC respectfully disagrees that its authority for this provision is questionable. DTSC can receive and has received financial assurance funds directly from financial institutions, such as when a Letter of Credit for a facility was not renewed. DTSC has ample authority to adopt these regulations. That authority includes, but is not limited to Health and Safety Code sections 25150, 25200.21, 58004, and 58012. In particular, section 25200.21 authorizes and requires DTSC to consider adopting new criteria related to the provision of financial assurance by the owners or operators of hazardous waste facilities.

DTSC agrees that existing regulations provide for the establishment of a standby trust in the event of a failure to perform closure or post closure care. And DTSC anticipates the use of the standby trust to allow for performance of corrective action obligations under these proposed regulations. The use of the standby trust has proven to be reliable and appropriate. However, these proposed regulations would strengthen the use of existing mechanisms, including the financial test and corporate guarantee, as long as a mutually agreed-upon process is in place for DTSC to access necessary funding for corrective action obligations. DTSC is not making any changes to the regulations in response to these comments.

[Sections 66264.143\(e\), 66264.145\(e\), 66264.147\(a\), 66264.147\(b\), 66264.147\(f\), 66264.151, 66265.143\(d\), 66265.145\(d\), 66265.147\(a\) and 66265.147\(b\).](#)

**CORRECTIVE ACTION FINANCIAL ASSURANCE****Comment Summary:**

The comment expresses support for the changes made by DTSC to the above provisions.

**Comment:** 3-4-1**Response:**

DTSC appreciates the support expressed in the comments and is not making any changes to the regulations.

[Sections 66264.143\(e\), 66264.145\(e\), 66264.147\(a\), 66264.147\(b\), 66264.147\(f\), 66264.151, 66265.143\(d\), 66265.145\(d\), 66265.147\(a\) and 66265.147\(b\).](#)

**USE OF THE TERM “ADMITTED CARRIER” AND NONADMITTED CARRIER****Comment Summary:**

The regulations should allow the insurance to be underwritten by any eligible nonadmitted carrier, including those on the List of Approved Surplus Lines Insurers (LASLI list) or by an “eligible carrier” meeting the requirements of California Insurance Code Section 1765.1. (§§ 66264.143(e), 66264.145(e), 66264.147(a) & (b), 66264.151, 66265.143(d), 66265.145(d) and 66265.147(a) & (b).)

**Comment:** 3-5-1**Response:**

DTSC respectfully disagrees with the comment. DTSC was aware of the fact that non-LASLI insurers are allowed to transact business in California. DTSC drafted the provision to restrict authorized carriers to those on the LASLI list for a few reasons. First, by definition, entities on the LASLI list have been vetted and approved by the California Department of Insurance, the state regulatory entity with jurisdiction and the most extensive expertise in regulating the insurance industry. This has the added benefit of reducing the time and expense DTSC would need to review and approve insurers providing financial assurance for owners or operators. Because there are plenty of insurers already on the LASLI list, there should not be a burden on the regulated community to find such an insurer. Entities not already on the LASLI list may take the modest steps required by the California Department of Insurance to be included in the LASLI list. Finally, restricting authorized insurers to those on the LASLI list would simplify enforcement and compliance of the financial assurance requirements. DTSC is not making any changes to the regulations in response to this comment.